Hill & Redman's Law of Landlord and Tenant

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DIVISION A: GENERAL LAW

Possession action by private landlord – whether Article 8 of the ECHR has horizontal applicability

McDonald v McDonald [2014] EWCA Civ 1049 is the clearest indication that we yet have that Article 8 of the ECHR cannot be employed horizontally, so as to enable issues of proportionality to be raised in a dispute between a tenant and a *private* landlord. In *Manchester CC v Pinnock* [2010] UKSC 45, it was finally accepted that Article 8 was relevant to possession disputes between a public sector landlord and a tenant, but Lord Neuberger (at [50]) expressly left open the question of whether Article 8 could be invoked by a tenant in a claim for possession by a private landlord, on the basis that the court itself was a public authority and therefore was bound to ensure that its orders complied with Article 8. Related issues arose in *Malik v Fassenfelt* [2013] EWCA Civ 798 (see *Bulletin No 101*) , and whilst the majority found it unnecessary to address them, Sir Alan Ward, in his valedictory judgment, gave considerable encouragement to private tenants who would seek to rely on Article 8. The instant case holds that Article 8 does not apply to disputes between landlords and tenants in the private sector, although there is of course every likelihood that this case, or a similar one, will soon go to the Supreme Court.

The facts of the case were that Mr and Mrs McDonald had purchased with the aid of a mortgage a property for their daughter M to occupy. M suffered from mental health problems and had been evicted from social housing in the past. The McDonalds had granted M an assured shorthold tenancy (AST) of

the property. Her rent was paid by housing benefit. So long as the McDonalds had kept up the mortgage repayments there had been no problem, but they had fallen into arrears, and the mortgagee had appointed receivers, who had given notice to M, and then applied for a possession order. Acting by her litigation friend, M had unsuccessfully tried to defend the proceedings before HHJ Corrie in the Oxford County Court on two grounds, which subsequently formed the grounds of her appeal to the Court of Appeal.

One ground had nothing to do with the Human Rights Act 1998: M argued that the receivers did not have power to serve a notice under s 21 of the Landlord and Tenant Act 1988 (LTA 1988) on her, and that it should have been served instead by the landlord (ie her parents) or the mortgagee. Giving the lead judgment of the Court of Appeal, Arden LJ (with whom Tomlinson and Ryder LJJ agreed) held that the mortgage conditions had to be construed purposively and, as they included a specific power to take possession of the property and sell it, they must be taken to include also all necessary powers to achieve those ends, [65]: 'the agency of the receivers must encompass the powers to enforce the security which the receivers are empowered to exercise'.

The ECHR ground is obviously of wider importance. It was agreed by both parties that Article 8(1) was engaged as the property in question was undoubtedly M's home, even if her tenancy had been determined, [12]; and that the court was a public authority, [13]. Arden LJ noted that the question of whether Article 8 would therefore apply when the Court was adjudicating on a dispute between a private landlord and a tenant had been expressly left open in *Pinnock,* [50]. In spite of several decisions in the ECtHR, suggesting that Article 8 might apply in these circumstances, Arden LJ held that there could not be said to be any 'clear and constant' jurisprudence of the Strasbourg court to the effect that proportionality had to be taken into account in deciding whether a possession order should be made, when s 21 of the LTA 1988 itself required that a court should automatically make a possession order if certain criteria were satisfied. Arden LJ pointed out that the various Strasbourg cases upon which M relied could be explained as cases where either the point had not been raised and argued, or they could be explained on the basis that eg the tenancy had originally been granted by a public authority. Further, none of the decisions was by a Grand Chamber, [41]. There was therefore no applicable 'clear and constant' jurisprudence to follow, and the Court of Appeal was accordingly bound by its earlier decision in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595 to the effect that s 21(4) of the LTA 1988 was compatible with Article 8.

The Court of Appeal accordingly upheld HHJ Corrie on both points. However, having decided that Article 8 did not apply, the first instance judge had gone on to hold that, if it did, then he would take the view that M's circumstances were sufficiently exceptional to justify dismissing the claim for possession on the basis that the making of a possession order would be disproportionate. The factors that influenced the judge were M's 'palpable disability and fragility'; the fact that mortgage arrears were never very substantial; and that there was no element of deception or dishonesty in the

mortgage application (in the light of the comments of Tomlinson LJ at [67], noted below, the latter is a curious finding). Arden LJ disagreed with HHJ Corrie's selection of factors. The McDonalds' initial honesty was not relevant; and the level of arrears was not particularly relevant, as the lender was entitled to recover its capital, [47]. Moreover he failed to direct himself that the standard required to interfere with the rights of a landlord in a public sector case was very high, and it could hardly be lower in a case involving a private landlord, [48]. 'Where the right of a former tenant to respect for his home has to be balanced against the rights of a landlord, the balance is almost always going to be struck in the landlord's favour because the landlord is enforcing his property right to return of the property' [50].

Tomlinson LJ noted that, whilst M's predicament might attract sympathy, the McDonalds were in 'egregious breach' of the mortgage conditions in granting the tenancy. It had been noted by Arden LJ that the mortgage conditions prohibited the grant of a tenancy to someone dependent on benefit, or to a relative; and that, in any event, the permission of the mortgagee had to be obtained to any letting. The McDonalds breached all three conditions in letting without consent to M.

If the decision had gone otherwise, then any suggestion that landlords may have difficulty in recovering possession from tenants under ASTs would have sent shock waves through the private rented sector: as Arden LJ notes, ASTs are a very popular form of tenancy in both the private and the public sector, [1] (though not necessarily with tenants!), and she also notes that Lord Woolf had observed in *Poplar* (at [69] of that case) that they were deliberately created by Parliament in 1988 so as to give a limited role to the courts.

The case offers yet another example (compare, eg, *Corby Borough Council v Scott* [2012] EWCA Civ 276; *Birmingham City Council v Lloyd* [2012] EWCA Civ 969; and *Southend-on-Sea BC v Armour* [2012] EWHC 3361 (QB) of the difficulty that the *Pinnock* test seems to be causing in the county courts. Although it was clearly intended to set a high bar, which would rarely be satisfied, in this case at first instance a highly experienced circuit judge would have held, if Article 8 had applied, that a possession order was disproportionate. Arden LJ and her colleagues in the Court of Appeal, on the other hand, were in no doubt that it, even if the court had had jurisdiction to review the proportionality of the making of a possession order, M would not have satisfied the test.

Whether tribunal may amplify its original reasons in response to an application for permission to appeal

Chowdhury v Bramerton Management Co Ltd [2014] UKUT 260 (Ch) may be noted briefly as an application of the principle – as held in *Havering LBC v MacDonald* [2012] UKUT 154 (LC) – that a lower tribunal may, in response to an application for permission to appeal, amplify the reasons which it originally gave, provided that 'those reasons were properly within the mind of the LVT at the time the decision was made and formed the basis (or at least part of the basis) for the decision being reached'. (The instant case was heard

before the coming into force of s 9 of the Tribunals, Courts and Enforcement Act 2007 which gives the first-tier tribunal an express power to review its decisions and to amend its reasoning).

Conflict between repairing covenant and covenant not to derogate from grant – whether interim injunction should be granted – balance of convenience test

Century Projects Ltd v Almacantar (*Centre Point*) *Ltd* [2014] EWHC 394 (Ch) raises the issue of how to resolve a possible conflict between a repairing covenant and a covenant not to derogate from the grant, or in the alternative a covenant for quiet enjoyment. The instant case involved the repair of Centre Point in London, which the landlords proposed to carry out with scaffolding covered with plastic screening. The tenants, who ran a restaurant with a viewing gallery on the 31-first to 33-third floors of the tower objected, claiming that this method of repair would obscure their panoramic views for a period of four to six months and thus severely affect their business. They produced an expert's report suggesting that the repairs could be appropriately effected using cradles suspended from the roof. It was noted that *Goldmile Properties Ltd v Lechouritis* [2003] EWCA Civ 49 permitted a landlord to comply with a repairing covenant without being in derogation of his grant or in breach of the covenant for quiet enjoyment, provided that he acted reasonably. In spite of this case, according to Nugee J there was a serious issue here to be tried as to whether – as one would normally expect – the landlord should be allowed to determine how to perform its repairing covenant, or whether this might have to give way to the tenant's commercial interests. That, however, was a matter for the trial, and not for this interim application. On this application, the balance of convenience lay in refusing an injunction, as, if an injunction were granted, there was a serious risk of the landlord incurring substantial uncompensatable loss.

(case noted at: EG 2014, 1429, 89)

Private nuisance – whether landlords had authorised and/or participated in it

Coventry and others v Lawrence and another (*No 2*) [2014] UKSC 46 is a supplemental judgment to the judgment in the important case in nuisance which the Supreme Court gave in February ([2014] UKSC 13). The issues addressed by the earlier judgment were whether one can acquire a right by prescription to commit what would otherwise be a noise nuisance; to what extent it is a defence to say that the defendant 'came to the nuisance'; the relevance of the actual use of the defendant's property to determining the nature of the locality; the relevance of a grant of planning permission in considering the question of nuisance; and the approach to be adopted in deciding whether to grant an injunction, or damages in lieu. All these may be matters of general interest to the property lawyer, but lie outside the main focus of the principal work. The supplemental judgment, however, is of more direct concern, as one of the issues left unresolved by the first judgment was

whether the landlords of the stadium and track used for various form of motor racing should be liable, along with the principal occupiers, for the substantial damages and costs involved. It is regrettable that the landlords do not seemed to have raised the relevant issues on the pleadings, and were appearing by the same Counsel, but this issue then arose at trial, and the judge dismissed the claims against the landlords. The Court of Appeal held that there was no nuisance, so no determination needed to be made there on the liability of the landlords, but, as the Supreme Court restored the first instance judgment, the issue of whether the landlords should be liable resurfaced.

The Supreme Court was divided on this issue. The majority (whose opinion was expressed by Lord Neuberger, with whom Lords Clarke and Sumption agreed) applied the well-known principle explained by Lord Millett in *Southwark LBC v Mills* [2001] 1 AC 1, that 'the … persons directly responsible for the activities in question are liable; but so too is anyone who authorised them', but as for landlords '[i]t is not enough for them to be aware of the nuisance and to take no steps to prevent it'. To be liable, they 'must either participate directly in the commission of the nuisance, or they must have authorised it by letting the property'. Lord Neuberger, like Lord Millett, approved, [13], the dicta of Pickford LJ in *Malzy v Eichholz* [1916] 2 KB 308, 319: '[a]uthority to conduct a business is not an authority to conduct it so as to create a nuisance, unless the business cannot be conducted without a nuisance'. He rejected the suggestion that the law had substantially moved on during the near century since that case was decided, noting that the tests in it had been expressly approved in *Mills.* The claimants argued that one case which suggested that the law might have developed was *Sampson v Hodson-Pressinger* [1981] 3 All ER 710. Lord Neuberger seemed to share the doubts of Lord Hoffmann in *Mills* (at pp 14–15) as to whether *Sampson* was rightly decided, [14], unless its ratio was that 'the ordinary residential user of the neighbouring flat which they had let would inevitably have involved a nuisance as a result of the use of that flat's balcony'. If that had indeed been its ratio, it is difficult to see why *Mills* was decided as it was. Lord Hoffmann fortunately had explained himself in more detail. He emphasised, at p 15, that he thought *Sampson* was reconcilable with earlier precedents only if, when the long lease of the lower flat was drafted, the roof over its living room did not form the roof terrace of the flat above ('this argument depends entirely upon the adaptation of the terrace taking place after the grant of the plaintiff's lease'): whether or not it did is not clear from the report. Another case which suggested that the law had developed was *Chartered Trust plc v Davies* [1997] 2 EGLR 83, but this involved the slightly different situation where, although another tenant was creating the nuisance, it was on the common parts, which were vested in the landlord, and so were under its control. As it would clearly have been possible for the stadium and track to have been used as such *without* creating a nuisance, it could not be said to have been the inevitable consequence of the letting, [15]. The trial judge had found against the landlord being liable, but he had relied on covenants in the lease, which Lord Neuberger thought he had misconstrued, [16], and Lord Neuberger did not think they were relevant anyway, [17].

Lord Carnwath, with whom Lord Mance concurred in a short judgment, dissented on this point. The dissent is unusual, in that neither dissentient adopts a substantially different test from the majority, nor does either take a different view of the law. Lord Carnwath rejects the less stringent test found in *Tetley v Chitty* [1986] 1 All ER 633 – whether a nuisance was 'likely' or 'foreseeable' – as unsupported by earlier or later authority and insufficiently rigorous. Nevertheless, whilst in theory applying the same tests as Lord Neuberger, he and Lord Mance come to a different conclusion, taking a broader view of a series of facts which led them to the conclusion that the landlords were actively participating in the nuisance, [59]–[60], in particular by taking the lead in negotiations with the local Council, and in trying to prevent it from serving a noise abatement order on those occupying the premises and running the events. Lord Neuberger considered the series of events in detail, and came to the conclusion that they did not show any more participation than one would expect of a landlord who was concerned to protect the value of his reversionary interest, [20]–[30]; Lord Carnwath, on the other hand, reviewed the same events, [60]–[66], and decided that they showed that the landlords had 'gone far beyond the ordinary role of a landlord protecting and enforcing his interests under a lease'.

The upshot of the case is that the law as it stood as a result of *Malzy* and *Mills* has been broadly affirmed. The dissent of Lords Carnwath and Mance may, however, have a slightly unsettling effect on the law. Although the inferences to be drawn from the facts can be the subject of appeals, appellate judges are naturally reluctant to interfere with the inferences drawn by those beneath them in the hierarchy. The fact that the Supreme Court was having to undertake this process for the first time demonstrates how judicial opinions may simply differ.

Finally, it should be noted that the respondents raised an issue on costs and the Human Rights Act 1998, arguing that the size of the appellants' bill of costs which they were facing (which included their lawyers' success fee, or uplift, and the premium for After The Event insurance), raised issues under Article 6 and Article 1 of Protocol 1 of the ECHR. Lord Neuberger and the other judges clearly had some sympathy with this argument, but directed that, if the respondents wished to pursue it, they would have to join the Attorney-General and the Ministry of Justice as parties, as a possible outcome could be the making of a declaration of incompatibility in respect of the regime for recovery of costs contained in Part II of the Access to Justice Act 1999, and such a declaration could not be made unless the Government was before the Court.

Block managed by Residents' Management Company – application for appointment of manager under Part II of the Landlord and Tenant 1987 refused – whether First-tier Tribunal had given sufficient reasons

Hill v Sorrento Management Association Ltd [2014] UKUT 0349 (LC) is an appeal by leaseholders against the refusal of the First-tier Tribunal (FTT) to

appoint a manager of the property in question. An unusual feature of the application is that the respondent landlord is a Residents' Management Company which represents the leaseholders. The appellant leaseholders were, however, unhappy at the way their block was being managed, and applied to the FTT both for rulings that service charges had not been reasonably incurred and for the appointment of a manager under Part II of the Landlord and Tenant 1987 (LTA 1987). The appellants had succeeded on some of their complaints relating to the service charge, principally the amount of legal costs that had been incurred due to the frequency with which the management company had consulted their solicitors, when the FTT had thought that the experienced managing agents would have been able to deal with the matters themselves. Having decided that some of the service charges had not been reasonably incurred, the FTT had stated that they were not satisfied that there had been any material breach of the landlord's obligations for the purposes of the application for the appointment of a manager. The Upper Tribunal (Mr Martin Rodger, QC, Deputy President) felt that this was inconsistent with the FTT's findings on the service charge issue. Further, the FTT had simply stated that they were not satisfied that it would be just or convenient to appoint a manager, and had not given any reason for this.

The Deputy President took the view that the parties were entitled to have fuller reasons for both these decisions. The case was accordingly remitted to the FTT for further consideration. It should perhaps be pointed out that there is nothing in the decision to suggest that a finding of breach of covenant on the landlord's part should automatically lead to the appointment of a manager: the Deputy President simply points out that the appointment of a manager involves the application of a discretion, and that the parties are entitled to an explanation of how the FTT came to exercise its discretion in the way that it did.

Costs incurred in service charge dispute – whether recoverable on basis that resolution was a prerequisite to the taking of forfeiture proceedings

Barrett v Robinson [2014] UKUT 0322 (LC) in the words of the Deputy President (Mr Martin Rodger, QC) 'concerns a large legal bill incurred in a dispute about a small service charge'. It also concerns the conflict between the intention that service charge disputes should be subject to a largely 'no costs' regime, whilst forfeiture operates under the traditional 'loser pays' regime.

B, the tenant of a long leasehold flat over a shop, was required to contribute towards the insurance premiums on the building of which it formed part. She objected to paying half. The first LVT upheld the method of apportionment, though her share of the premiums was reduced for other reasons. A second LVT then determined that she was bound to pay £6,250 in costs incurred by her landlord R in connection with those proceedings. The B appealed to the UT against the second determination. The contribution towards insurance payable by B was described as 'insurance rent' but it was not reserved as rent. Further, it was the only contribution that B was required to make: there was

no further service charge as such, because B was required to maintain her own half of the building. There was, however, a clause in the lease which required B to pay all costs etc. incurred 'in or in contemplation of any proceedings or the preparation of any notice under [s146 LPA 1925].' The second LVT had considered that it was bound by the decision of the Court of Appeal in *Freeholders of 69 Marina v Oram* [2011] EWCA Civ 1258 (discussed in *Bulletin No 91*), which had decided that a notice under s 146 had to be served on a tenant for failure to pay a service charge, even if the service charge was reserved by way of rent. It therefore accepted an argument on behalf of R that the first LVT proceedings were, in effect, a prerequisite to the eventual taking of forfeiture proceedings.

Although the Deputy President clearly shares the doubts (see [55]–[56]) of commentators (including the present editor) as to whether *69 Marina* was correctly decided, he was able here to distinguish it by pointing out that the terms of the clause in the present lease did not provide a general indemnity against all legal costs which might be incurred by the landlord: they were restricted to those incurred in connection with s 146: see [46]–[47]. This would apply only if forfeiture were "avoided otherwise than by relief granted by the court". This necessarily implied that there were good reasons to forfeit, and here there would not have been. Further, the amount that was allegedly due was £301.91, which fell below the amount of £350 prescribed under the Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (England) Regulations 2004. It would not therefore have been possible for R to forfeit for non –payment of the insurance premium, and the proceedings before the first LVT could not be said to fall within the contemplation of the service of a s146 notice.

FTT's difficulty in interpreting lease – confirmation that there was no 'burden of proof' to satisfy

One Housing Group v Leaseholders of 29 flats in the building known as Navigation Court [2014] UKUT 0330 (LC) concerns the eponymous block in London's Docklands. The LVT had found difficulty in interpreting the extent of 'the Estate' (the service charge distinguished between expenditure on the Estate and that on the Block) and appeared to have approached the problem on the basis that the onus lay upon the landlord to establish the definition and the reasonableness of the service charge costs. In the Upper Tribunal, HHJ Cousins rejected this approach. Although he described the relevant provisions as 'various and somewhat convoluted', [54], 'the Estate' was defined in the relevant underlease, and that was clearly the intention of the parties at the time. The case was therefore remitted to the FTT for determination of the service charge due on that basis.

Interpretation of 'the Estate' in Right to Buy lease – relevant that tenant would have been familiar with physical layout

One of the issues that arose in *One Housing Group Ltd v Kingham* [2014] UKUT 0231 (LC) also concerned the extent of 'the Estate' for service charge

purposes. Again, the decision turns largely on the interpretation of the lease in question, and is thus of limited relevance (though as it concerns the standard 'Right to Buy' Lease used by the London Borough of Tower Hamlets it is arguably of fairly wide interest). A point of potentially wider interest is the point made by the Deputy President (Mr Martin Rodger, QC), that the Right to Buy leases in the instant case were granted to persons who, *ex hypothesi*, had been tenants of their properties for at least two years prior their purchasing, and that they should therefore be taken as having some familiarity with the layout 'on the ground': subsequent purchasers could then be expected to raise the appropriate enquiries. The case also raised issues on the charging for the repair and maintenance costs of a communal district heating system which very much turns on its own facts.

DIVISION B: BUSINESS TENANCIES

Renewal of lease under Part II of the Landlord and Tenant Act 1954 – whether breach of implied covenant to use in a tenant-like manner could amount to a breach of s 30(1)(a) – breach of access covenant and positive user covenant as breaches of s 30(1)(c)

Youssefi v Mussellwhite [2014] EWCA Civ 885 raises some unusual points on the renewal of tenancies under the Landlord and Tenant Act 1954 (LTA 1954). L had opposed the T's application to renew her tenancy on various grounds, and in the county court had succeeded on Ground A (s 30(1)(a)) – failure to comply with repairing obligations; and Ground C (s 30(1)(c)) – other substantial breaches. T appealed to the Court of Appeal.

The only allegation of disrepair on which L had succeeded in the county court was T's failure to control plant growth – the growth of creeper – on the wall, downpipe, eaves and roof of the property. Whilst it was accepted that this was not a breach of any repairing obligation *per se* on the part of T, the Recorder did hold it to be a breach of T's implied covenant to use the property in a tenant-like manner, which thus fell within s 30(1)(a). The Court of Appeal disagreed. It is not entirely clear whether breach of what is generally accepted to be an implied tenant's covenant could put the tenant in breach of s 30(1)(a), as the Court held that, as L covenant to repair the exterior, on the facts this could not be a breach on the part of T, [34]: further, as it would cost only £350 to remove the creeper, it could not be said to be a substantial breach, [35].

T's appeal nevertheless failed overall, as the CA held that T was in breach of the usual covenant in the lease requiring T to allow L and her agents reasonable access to inspect the premises, [38]–[42], and also in breach in not using the premises for Class A1 or A3 retail use. Although there was no express 'keep open covenant' the CA agreed with the trial judge that the lease imposed a positive and not merely a negative user covenant, [47]. T was in breach of this obligation; although L did not own any other property in the vicinity which would be adversely affected by T's breach, and L had not

adduced any evidence of quantifiable loss to the reversion, the judge was entitled to conclude that the failure of T to conduct a business on the premises was prejudicial to L's legitimate interests, [49]. In view of the 'exceptionally difficult' relationship between L and T, characterised by the two breaches within s 30(1)(c), the judge was right to hold that a new tenancy should not be granted.

(case noted at: [2014] Comm Leases 2082–2084)

DIVISION E: LONG LEASES

Application for collective enfranchisement – whether applicants were associated companies – whether structure set up was a sham – whether objection based on proportion of non-residential use could be raised at the hearing (and treatment of serviced lettings) – criteria which the purchase price proposed by the tenants should satisfy

Westbrook Dolphin Square Ltd v Friends Life Ltd [2014] EWHC 2433 (Ch) is a lengthy and important judgment (455 paragraphs) which – in view of the several principles at stake and the value of the property – would seem destined to go higher. The preliminary skirmish in the litigation has already appeared in the law reports. The current claimants (WDS) had originally served an initial purchase notice under s 13 of the Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA 1993) in September 2007, but, in view of the fall in the property market, had discontinued the subsequent proceedings five days before a High Court hearing was due to begin. Two and a half years later in April 2010 WDS then served a further initial purchase notice, and claimed (in the present proceedings) a declaration that they were entitled to acquire the freehold. The defendant freeholders, Friends Life (FL) succeeded in the High Court in getting the proceedings struck out on the basis that the claim was substantially the same as the one that had been discontinued, but this decision was reversed by the Court of Appeal ([2012] EWCA Civ 66: see *Bulletin No 94*. It is thus the phase of the litigation which began in 2010 which has come before Mann J in the High Court.

The background to this case is the convoluted legal structure of Dolphin Square, the well-known estate of 1,223 flats in Pimlico. The freehold was owned by Friends Provident (FP), subject to a headlease to Tannenberg (T) and an underlease to WDS. T and WDS (which are both in the American Westbrook group (W)) had acquired the headlease and underlease in January 2006. Although the freehold purchase was to take the form of collective enfranchisement under the LRHUDA 1993 ('the Act'), it was in reality an attempt by W compulsorily to acquire the freehold following the abolition of the residence requirements for enfranchisers under the Commonhold and Leasehold Reform Act 2002 in order to attempt to qualify for enfranchisement WDSq had created 1,223 underleases (each subject to any existing

tenancies of the flats) to 612 'special purpose vehicles' (SPVs), companies incorporated in Jersey, each of which owned the underleases of two flats (or in one case, only one). Slightly simplifying the facts, all but 165 of the flats were and are let to residential tenants paying market rents; the remaining 165 are let by the relevant SPVs to a company, Mantilla Ltd (M) which in turn let them out on short term (up to 89 days) furnished and serviced occupancies. The present proceedings are therefore an attempt by the lessee and underlessee of the whole building to obtain the freehold of the estate, and is far removed from the usual scenario when owner-occupier and/or small-scale buy-to-let leaseholders wish to enfranchise.

The case raises and decides several issues, [42]: almost any one of them, taken on its own, would make for an important case.

(*1*) *Is each of the SPVs a qualifying tenancy, or are they precluded from being so by virtue of their being 'associated companies' within the meaning of s5 of the Act?* (see [71]–[97])

Under s 5(5) of the Act a person may be a 'qualifying tenant' for the purposes of collective enfranchisement if he is the owner of not more than two flats in a building. For this reason, the lease of each SPV contained only two flats. In an attempt to prevent abuse, where a flat is let to a body corporate, under s 5(6) a flat let to an 'associated company' shall be treated as if it were let to that first company. The definition of 'associated company' in s 1159 of the Companies Act 2006 is adopted for these purposes. To summarise a complicated position, although each SPV was clearly 'associated' in the loose sense, none of them fell within the statutory definition as 50% of the voting rights in each was held by two companies which were nominally not associated.

(*2*) *Is W prevented from enfranchising because the corporate and leasehold structure which has been set up is an artificial device to permit enfranchisement where it would not otherwise be possible, and is thus a 'sham'?* (see [98]–[142])

Although the issue in the notices and pleadings seemed to rely on the doctrine of sham, in the hearing the arguments partook more of the *Ramsay* principles (*Ramsay v IRC* [1982] AC 300) as applied to tax schemes. Again, it is not possible to do justice to the intricacies of the arguments for and against in a note of this nature, but Mann J summarised FL's submissions as amounting to an argument that 'if Parliament had appreciated that this sort of thing could happen, it would have legislated to prevent it', [139]. Even if this were the case, the logic of *Jones v Wrotham Park Estates* [1980] AC 74, a case under the Leasehold Reform Act 1967, was that such a highly purposive interpretation ought not to succeed. This argument of FL also failed.

(*3*) *Would enfranchisement infringe FL's rights under the HRA 1998?* [143]–[149]

FL raised an argument based on Article 1, Protocol 1, supported by the non-discrimination provisions of Article 1, though – in view of *James v UK* [1986] EHRR 123 and *Earl Cadogan v Sportelli* [2010] 1 AC 226 did not argue

that the overall scheme of Part 1 of the Act infringed the Convention. Mann J had little difficulty in holding that any Convention rights of FL had not been infringed.

(4) *Is FL entitled to raise the point in these court proceedings that the building contains more than 25% of space which is occupied for non-residential purposes, given that the point was not raised in its counter-notice?* (see [150] – [175]).

It is surprising that there has been so little previous authority on this point. Under s 21 of the Act the reversioner 'shall' give a counter-notice (sub-s (1)) which 'must' comply with certain requirements (sub-s (2)). W argued that the clear implication of this was that FL could not raise later an objection which had not been raised in its counter-notice. Similar arguments on analogous provisions of the Act had been accepted in reported county court decisions. FL, on the other hand, pointed to dicta of Auld LJ in *Cornwall Crescent London Ltd v Kensington & Chelsea* [2006] 1 WLR 1186, CA which suggested otherwise, and to the fact that the Act – unlike s 30 of the LTA 1954 – did not specifically provide that a landlord could resist an application only on grounds which had already been specified in a notice. Further, if a landlord failed to serve a notice at all, s 25(3) of the Act still required the participating tenants to satisfy the court that they were entitled to exercise the right to collective enfranchisement. Mann J therefore found in favour of FL on this point, pointing out that it was consistent with the construction of similar provisions in the Commonhold and Leasehold Reform Act 2002 (CLRA 2002) on the RTM which the Upper Tribunal had recently adopted.

(5) *If FL is entitled to raise the point about non-residential use, does the building in fact contain more than 25% of such space?* (see [176]–[285])

Much of the discussion about this was specific to the particular physical layout of Dolphin Court, but some points of more general importance were decided. The point which is likely to be of most general application is the discussion of what is meant by 'residential' and 'non-residential' use. The fact that some 165 of the flats were occupied on serviced occupancies not (generally) exceeding 89 days led FL to argue that their use was 'non-residential' and the proportion in question – taken with parts which were by any test 'non-residential – would therefore have the effect of excluding the block from the scope of the Act. Again, there was much detailed discussion, but Mann J held that there was no longer any requirement that a flat should be a person's home or principal residence, and that the flats remained 'residential' in spite of the fact that some hotel-like services were provided for them. A further 36 flats were referred to as 'corporate housing' and were let for longer periods of occupation tenancies – the average was 309 days – but, like the 165 flats, were let furnished and with some hotel services. Again, these were held to be 'residential'. The remainder of the discussion revolved around whether various other areas formed part of the common parts.

(6) *Is W's notice ineffective because it does not 'specify the proposed purchase price'? – the argument being whether the price put forward by the tenants in their initial notice should be objectively or alternatively subjectively justified in*

valuation terms, and not merely a nominal figure. (see [286]–[328]). (*If the price has to pass any such test then the question would arise of whether W's offer did in fact do so* (see [329]–[393]).

Again, it is perhaps surprising that there was no clear existing precedent on this issue, which is in certain respects related to that in Issue 4 (above). The figure put forward in W's initial notice was £111.66M and FL argued that this was not a bona fide proposed purchase price and the notice was not therefore valid. Mann J stated that, in spite of the arguments of W to the contrary, he felt constrained by *Cadogan v Morris* [1999] 4 EGLR 59 (CA) and *Cornwall Crescent London Ltd v Kensington & Chelsea* [2006] 1 WLR 1186 (CA) to hold that the proposed purchase price put forward by the participating tenants in their initial notice had to satisfy *some* criteria, not least because, if the reversioner failed to respond, it might become the price at which its interest might be acquired: the question was what they were. After lengthy consideration Mann J reached the view that the tenants' figure must be a 'genuine opening offer' and not merely a 'nominal' figure, [325]: requiring this would protect the landlord from the danger of having to sell at an absurdly low valuation. W's offer, though clearly on the low side, was 'bona fide in the sense that it was a real offer which was intended to be taken seriously as such and which no reasonable landlord would dismiss as patently absurd or nonsensical even if it was unlikely to be accepted'; it thus 'passes every aspect of the correct test', [328].

Part of Mann J's thinking in deciding that the figure to be put forward could be an 'opening shot', and not a figure which was carefully calculated, was that it could not have been Parliament's intention that the court should have to consider detailed valuation evidence at the stage of determining eligibility, only for such evidence to have to be given again if the price then had to be referred to a valuation tribunal. Nevertheless, he did consider the offer in detail, in case an appeal on the test to be applied should succeed, and apply a more stringent test. This inevitably took him into an analysis of detailed valuation issues. He reached the conclusion on this that, if the figure in the initial purchase notice had to satisfy some criterion that it was within a range that a reasonable valuer could propose and reasonably justify, the figure of £111.66M would still satisfy it, albeit that the figure would be right at the bottom of that range, [393].

(7) if the enfranchisement scheme would otherwise operate against FL, whether it can claim to be a victim of a transfer at an undervalue under s 423 of the Insolvency Act 1986 (see [394] – [454]).

FL's argument on this point was that the creation of the various SPV leases (for which actual consideration was paid) were transactions at an undervalue, that FL was the 'victim' of these transactions, and that therefore it could call for them to be set aside under s 423 of the Insolvency Act 1986 as transactions defrauding creditors. Unsurprisingly, Mann J. was unconvinced by each of the stages of FL's arguments on this point.

The judgment, therefore, was that W was entitled to enfranchise, although it seems highly likely that the matter will go again on appeal. Just as the

removal of the residence qualification for the enfranchisement of houses under the Leasehold Act Act 1967 has led to some rather unlikely lessees taking advantage of its provisions, the removal by the CLRA 2002 of the residence qualifications under the LRHUDA 1993 would seem to have opened the door, notwithstanding ss 5(5) and (6) of the Act, to a collective enfranchisement which can hardly have been within the contemplation of Parliament when passing the CLRA 2002. But, as found at (2) above, this has been held to be an insufficient argument.

NOTES ON CASES

Anders v Haralambous [2013] EWHC 2676 (QB): SJ 2014, 158(31), 28 (noted in *Bulletin No 102*)

Birmingham CC v Beech [2014] EWCA Civ 830: HLM. 2014, Jul/Aug, 10–12 (noted in *Bulletin No 106*)

Boots UK Ltd v Goldpine Estates Ltd (CA (Civ Div)): EG 2014, 1433, 51

Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd [2013] UKUT 81 (LC); [2013] L & TR 16: L & T Review 2014, 18(4), 150–152 (noted in *Bulletin No 99*)

Coventry (*t/a RDC Promotions*) *v Lawrence* [2014] UKSC 13; [2014] 2 WLR 433: [2014] CLJ 247–250

Daejan Properties Ltd v Griffin and Mathew [2014] UKUT 0206 (LC): EG 2014, 1430, 59 (noted in *Bulletin No 106*)

Friends Life Management Services Ltd v A & A Express Building Ltd [2014] EWHC 1463(Ch): EG 2014, 1425, 78; [2014] Comm. Leases 2072–2074 (noted in *Bulletin No 106*)

Grove Investments Ltd v Cape Building Products Ltd [2014] CSIH 43 (efficacy of a terminal *Jervis v Harris* clause): EG 2014, 1427, 88

Horne and Meredith Properties Ltd v Cox [2014] EWCA Civ 423: L & T Review 2014, 18(4), 146–148 (noted in *Bulletin No 105*)

Iceland Foods Ltd v Castlebrook Holdings Ltd [2014] PLSCS 95 (Chester County Court) (tenant required to take longer term than requested) [2014] Comm Leases 2063–2065

Lie v Mohile [2014] EWCA Civ 728: [2014] Comm. Leases 2068–2069; and L & T Review 2014, 18(4), D28 (noted in *Bulletin No 106*)

Marks & Spencer plc v Paribas Securities Service Trust Co (*Jersey*) *Ltd* [2014] EWCA Civ 603 [2014] Comm Leases 2070–2071 (noted in *Bulletin No 106*)

Martin Retail Group Ltd v Crawley BC (CC (Central London)) (unreported, December 24, 2013): LSG 2014, 111(27), 21; L & T Review 2014, 18(4), 152–154; and [2014] Comm Leases 2075–2077

Masih v Yousaf [2014] EWCA Civ 234, [2014] All ER (D) 56 (Feb): L & T Review 2014, 18(4), 148–150 (noted in *Bulletin No 104*)

Mount Eden Land Ltd v Bolsover Investments Ltd (*Ch D*) (Alterations – landlord's consent – not to be unreasonably withheld): [2014] Comm Leases 2080

Peel Land and Property (*Ports No.3*) *Ltd v TS Sheerness Steel Ltd* [2014] EWCA Civ 100: NLJ 2014, 164(7616), 15–16 (noted in *Bulletin No 104*)

Pillar Denton Ltd and Ors v Jervis & Ors (*Re Games Station Ltd*) [2014] EWCA Civ 180: SJ 2014, 158(31), 30–31 (noted in *Bulletin No 104*)

Preston v Area Estates Ltd and another [2014] EWHC 1206 (Admin): JHL 2014, 17(4), D72-D73 (noted in Bulletin No (noted in *Bulletin No 105*)

Red Kite Community Housing Ltd v Robertson [2014] UKUT 0134 (LC): EG 2014, 1427, 90 (noted in *Bulletin No 105*)

R (*on the application of Twelve Bay Tree Ltd*) *v The Rent Assessment Panel* [2014] EWHC 1229 (Admin): JHL 2014, 17(4), D82-D83 (noted in *Bulletin No 106*)

R. (*on the application of Tummond*) *v Reading County Court and another* [2014] EWHC 1039 (Admin): JHL 2014, 17(4), D85-D86 (noted in *Bulletin No 105*)

Schroder Exempt Property Unit Trust v Birmingham City Council [2014] EWHC 2207 (Admin): [2014] Comm Leases 2078–2079

Shebelle Enterprises Ltd v Hampstead Garden Suburb Trust Ltd [2014] EWCA Civ 305: JHL 2014, 17(4), D73-D74 (noted in *Bulletin No 105*)

Southend-on-Sea BC v Armour [2014] EWCA Civ 231: SJ 2014, 158(28), 18–19,21 (noted in *Bulletin No 105*)

Windermere Marina Village Limited v Wild [2014] UKUT 163 (LC): EG 2014, 1428, 95 (noted in *Bulletin No 106*)

Yeung v Potel [2014] EWCA Civ 481: JHL 2014, 17(4), D81-D82 (noted in *Bulletin No 106*)

ARTICLES OF INTEREST

A 'lease of rights'? L & T Review 2014, 18(4), 139–145

A new model for speeding up lettings EG 2014, 1428, 86–87

A tale of two systems (leasehold and commonhold) EG 2014, 1429, 83

A VAT headache for property owners EG 2014, 1428, 94

Another blow for AST landlords (*Gardner v McCusker*, unreported, May 2014 (CC (Birmingham) EG 2014, 1432, 53

Assessing housing conditions: the HHSRS past, present and future JHL 2014, 17(4), 84–89

Breaking bad – tenants disappointed again (recent cases on tenants' break clauses) L &T Review 2014, 18(4), 127–128

ARTICLES OF INTEREST

Breaking up is hard to do (effective exercise of a break clause) NLJ 2014, 164(7618), 8–9

Commercial property update SJ 2014, 158(27), 33–34

Courting disaster (recent landlord and tenant cases in the Court of Appeal) EG 2014, 1433, 48–49

Cutting the red tape (requiring letting agents to join a redress scheme) EG 2014, 1425, 79

Disrepair, default judgments and debarring orders. SJ 2014, 158(27), 28.

Don't get in a fix over fixtures (tenants' trade fixtures) NLJ 2014, 164(7616), 15–16

Fairweather or Foal – Can a squatter acquire title to leasehold property? (scope for adverse possession against unregistered leases) [2014] L&T Rev 129

Gypsy and Traveller Law Update – Part 2 Legal Action, July/August 2014

Housing Benefit Law Update 2014 Legal Action, July/August 2014

How early is too early? (options to renew leases) EG 2014, 1434, 52

How to exercise a tenant break option (practitioner's page) L & T Review 2014, 18(4), 159–161

In Practice: Legal Update: Commercial Property: Competition and Use (commercial property lawyers and the Competition Act 1998) Law Society Gazette, 28 July 2014

Insurance and the conveyancer [2014] Conv 286–293

Introducing the MCL (Model Commercial Lease) EG 2014, 1428, 88

Landlord and Tenant Act 1987 [2014] Conv 340–343

Landlord and tenant update SJ 2014, 158(30), 35–36

Measure twice, cut once (tenancy deposit schemes) HL. 2014, Jul/Aug Supp (Social Housing Bulletin), vi-viii

MEE time (Minimum Energy Efficiency Standard Regulations for Non-domestic Properties in England and Wales) EG 2014, 1432, 52

Please sir, can I have a new tenancy? (grounds of opposition under the LTA 1954) EG 2014, 1431, 47

Questions and answers: claim to surface void created by open-cast mining – disappearance of subject-matter of lease – frustration L & T Review 2014, 18(4), 155–158

Recent Developments in Housing Law Legal Action, July/August 2014

Rent Lawfully Due (need for rent increases to accord with contractual provisions of tenancy agreement) Legal Action, July/August 2014

Right to Manage: Ironing out the kinks (recent case law on the RTM) [2014] L&T Rev 133

SDLT – it's not stamp duty: EG 2014, 1432, 50–51

Selective licensing – residents, landlords and community engagement: the perspectives of scheme managers JHL 2014, 17(4), 72–77

Shortfalls and reversions EG 2014, 1429, 87

Split ownership of a combined property (position where premises owned by different landlords are combined) EG 2014, 1431, 48–49

Surplus space (making use of LLT ie Leasehold Liability Transfer) EG 2014, 1425, 72–75

Tackling rogue landlords: Housing Act 2014, Parts 2 and 3 JHL 2014, 17(4), 78–83

Tenant insolvency – landlord's obligation for empty property rates [2014] Comm. Leases 2078–2079

Tenants must know where they can reach their landlords (effect of s 48 of the LTA 1987) SJ 2014, 158(27), 15.

Tenants' new routes to redress (schemes relating to managing and letting agents) EG 2014, 1430, 58

Testing times for tenants (overview of recent cases on break notices) EG 2014, 1428, 90–91

The advantages of thinking ahead (drafting of reversionary leases) EG 2014, 1434, 53

The future of the private rented sector JHL 2014, 17(4), 69–71

The key to change (attempts to improve the eviction process) NLJ 2014, 164 (7619), 13–14

Trading premises get an upgrade (VAT treatment of transfer of business as a going concern) EG 2014, 1433, 47

Two professions divided by a common language? (meaning of 'accrued' to lawyers and accountants, in context of service charges) EG 2014, 1429, 84–85

Using Public Law Arguments to Resolve HB Issues and Possession Proceedings Legal Action, July/August 2014

What do tenants really, really want? (retail tenants' ideal terms) EG 2014, 1427, 82–84

NEWS AND CONSULTATIONS

The Department for Business, Innovation and Skills announced on 14 July 2014 that the Government will conduct a further consultation on any proposed changes to the Land Registry's business model: www.gov.uk/government/uploads/system/uploads/attachment_data/file/328872/bis_14_949_Introduction_of_a_Land_Registry_Service_Delivery_Company.pdf

A Welsh Government consultation seeks comments by 14 October, 2014, on the renting homes illustrative model contract and supporting guidance. See: http://wales.gov.uk/docs/desh/consultation/140723-illustrative-model-contract-consultation-en.pdf

The Competition and Markets Authority is conducting a consultation into residential property management services. The consultation is open until 19 September 2014: www.gov.uk/government/uploads/system/uploads/attachment_data/file/339932/Update_Paper_August_2014.pdf

A Welsh Government consultation seeks views by 13 October 2014 on draft guidance in respect of notifiable events for registered social landlords: http://wales.gov.uk/docs/desh/consultation/140314-guidance-on-notifiable-event-for-rsl-en.pdf

DEFRA is consulting on a scheme for fairer compensation for agricultural tenants when their tenancies end. Comments are requested by 10 October 2014: https://consult.defra.gov.uk/ahdb-sponsorship-and-agricultural-tenancies/consultation-on-modernising-agricultural-tenancies/supporting_documents/Consultation%20document.pdf

UK Visas and Immigration has issued a Factsheet on the requirements upon landlords under the Immigration Act 2014 to check renting tenants' immigration status: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/341876/Factsheet_Landlords_Aug_14.pdf

OFFICIAL PUBLICATIONS

The **Property Ombudsman** has issued a revised **Code of Practice for Residential Letting Agents**, which is effective from **1 August 2014**. It is available on his website: http://www.tpos.co.uk/

The **Property Ombudsman** has also issued a revised **Code of Practice for Residential Estate Agents**, which is effective from **1 August 2014**. It is available on his website: http://www.tpos.co.uk/

The **Department for Communities and Local Government** has issued **Your Right to Buy Your Home: A guide for tenants of councils, new towns and registered social landlords including housing associations**, a revised guide which takes account of changes noted under 'Statutory Instruments' in this Bulletin, and earlier changes: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336606/Your_Right_to_Buy_Your_Home_A_Guide_July_2014.pdf

The **Department for Communities and Local Government** on 11 August 2014 published a policy paper setting out details of **directions to cap charges to council leaseholders for improvement works** funded by the government: the Social Landlords Mandatory Reduction of Service Charges (England) Directions 2014; and the Social Landlords Discretionary Reduction of Service Charges (England) Directions 2014. See: https://www.gov.uk/government/publications/social-landlords-reduction-of-service-charges-mandatory-and-discretionary-directions-2014; https://www.gov.uk/government/news/flos-law-new-cap-for-council-house-repairs-comes-into-force

PRACTICE GUIDES ETC

H.M. Land Registry has issued revised versions of **Practice Guide 16**, on profits a prendre; **26**, on determining a registered lease; **18**, on franchises; **75**, on transfers under a chargee's power of sale; and **77**, on altering the register by removing land from a title plan.

PRESS RELEASES

The **Department for Communities and Local Government** on 8 July 2014 issued a **Press Release** on **Support to resolve social tenants' complaints**: www.gov.uk/government/news/support-to-resolve-social-tenants-complaints

The **Law Society's Press Release: Simpler house-buying – Joint Venture for Conveyancing Portal** announces the creation of a portal to allow smaller firms to gain access to platforms and conveyancing tools normally available only to larger firms. The portal will also enable professionals to communicate with each other and with their clients: www.lawsociety.org.uk/news/press-releases/simpler-house-buying-joint-venture-for-conveyancing-portal/

TPO backs **Client Money Protection** and calls for more landlords to seek the greatest protection rather than the cheapest fee when choosing a letting agent: http://www.tpos.co.uk/news-14.htm

STATUTORY INSTRUMENTS

Housing (Right to Buy) (Prescribed Forms) (Amendment) (England) Regulations 2014, SI 2014/1797 come into force on 4 August 2014 (for England only) and prescribe a new form for tenants to claim the Right to Buy, which is intended to be easier to complete.

Housing (Right to Buy) (Maximum Percentage Discount) (England) Order 2014, SI 2014/1915, increases the maximum discount on houses to 70% with effect from 20 July 2014.

Mobile Homes (Written Statement) (Wales) Regulations 2014, SI 2014/1762 specifies additional information to be contained in agreements between occupiers of mobile homes and site managers; and it must be in the form specified in the regulations (effective 1 October 2014).

Mobile Homes (Pitch Fees) (Prescribed Form) (Wales) Regulations 2014, SI 2014/1760 specifies the form of the document which must accompany a proposed pitch fee review (effective 1 October 2014).

The **Mobile Homes (Selling and Gifting) Wales Regulations 2014, SI 2014/1763** came into force on 1 August 2014 (Wales only).

The **Mobile Homes (Site Rules) (Wales) Regulations 2014, SI 2014/1764**, come into force on 1 October 2014 (Wales only).

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